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CLERK

81-2183

IN THE
SUPEREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981
NO. _____

SHIRLEY J. RUFFIN,

Petitioner,

v.

William J. Casey, ~~STANSFIELD TURNER~~, Director,
Central Intelligence Agency, et al.

Respondents.

---

PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 24, 1982

## QUESTION PRESENTED

Is Title VII the exclusive judicial remedy for federal employment discrimination, even where the transactions giving rise to the claims are cognizable and pled under the First and Fifth Amendments?

Respondents not named in the caption are: Noel Firth, Fred Lott, Rebecca Donegan, and Granville Woodson.

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Shirley J. Ruffin v. Stansfield Turner, Director, Central Intelligence Agency, et al. (D.C. Cir. 1982) .

No. 80-2337, [No Opinion] Filed, February 24, 1982.

E. GROUNDS ON WHICH JURISDICTION IS INVOKED:

1. Date of Judgment, United States Court of Appeals For the District of Columbia Circuit: February 24, 1982.

2. The ninety day period expires on May 25, 1982.

3. Statutory Provisions conferring on this Court jurisdiction to review by writ of certiorari: 28 U.S.C. §1254(1).

F. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

1. Amendment I - U.S. Constitution:

Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to

petition the Government for a redress of grievances.

2. Amendment V - U.S. Constitution:

No person ... (shall) be deprived of ... liberty or property, without due process of law ...

3. 42 U.S.C. §2000e-16(a):

All personnel actions affecting employees or applicants for employment ... in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), ... shall be made free from any discrimination based on race, color, religion, sex, or national origin.

## STATEMENT OF THE CASE

The petitioner, Shirley J. Ruffin, was employed by the Central Intelligence Agency from 1963 until 1978. On April 30, 1978 she filed a formal complaint alleging race and sex discrimination (Ms. Ruffin is black) under Title VII. On June 23, 1978 she filed a retaliation complaint based on actions taken against her by her supervisors during the pendency of her formal complaint. In early July, 1978, respondent Noel Firth, Director of the Office of Imagery Analysis, the division where petitioner was employed, requested a meeting of the agency Personnel Evaluation Board. His justification was that petitioner presented problems in her section due to her personality, and that she exhibited tendencies that closely resembled the profiles of potential national

security violators. The Personnel Evaluation Board ordered petitioner to undergo a physical and psychiatric fitness for duty examination. Petitioner refused to take the examination, believing it to be another act of retaliation for her complaints. On July 26, 1978 she was placed in a non-duty pay status and barred from her work place. On August 3, 1978 she filed another retaliation complaint based on the actions that took place in July. After some seven weeks in the non-duty pay status, realizing she would not soon be allowed to work, petitioner resigned.

After waiting over 10 months, during which the agency promised an investigation, but did little to investigate her complaints, petitioner, on June 12, 1979 filed a 9 count complaint in the United States District Court for the District of Columbia,

naming the respondents as defendants. The 9 counts were titled 1) Sex Discrimination; 2) Race Discrimination; 3) Retaliation; 4) Procedural Violation of Title VII; 5) Denial of Freedom of Association; 6) Denial of Freedom of Speech; 7) Conspiracy; 8) Wrongful Discharge; and 9) Violation of Equal Pay Act. Counts 4 through 8 alleged causes of action founded directly on the First and Fifth Amendments to the Constitution.

The respondents filed various motions to dismiss, and the District Court dismissed all non-Title VII claims against the agency and the named individuals, except for count 9, which was allowed against the aceny, but was later abandoned by the petitioner. What was tried, then, were counts 1 through 3, against the agency only.

In dismissing all counts but 1,2,3

and 9, the district court relied on Brown v. General Services Adminstration, 425 U.S.. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), and Pace v. Mathews, 12 E.P.D. ¶11,108, 15 F.E.P. Cases 703 (D.C.D.C. 1976). The court reasoned that Title VII was the exclsive remedy, even to the exclusion of causes of action based directly on the Constitution.

A non-jury trial was held in September, 1980. The court found for the agency on all counts. Petitioner then appealed to the United States Court of Appeals for the District of Columbia Circuit. The question before that court was "(W)hether or not the District Court erred when it dismissed causes of action founded directly on the Constitution, on the ground that 42 U.S.C. §2000(e)-16 (Title VII) provided the exclusive judicial remedy for federal

employees faced with discrimination in employment." On February 24, 1982 that court affirmed the district court in a terse memorandum opinion.

## ARGUMENT

I. THE COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Decision Of The Court Of Appeals Is Inconsistant With The Rulings Of This Court With Respect To Bivens-Type Actions.

In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), this Court, for the first time, directly[1] approved the idea that one could base a cause of action in a federal court on the United States Constitution. There, a cause of action was allowed founded on the Fourth Amendment.

[1] Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), intimated that caused of action based directly on the Constitution might be maintained in federal courts, but never directly decided the question.

It held individuals liable for constitutional violations committed while they were agents of the Federal Bureau of Investigation.

Since that time this Court has reinforced the idea that the Constitution is, itself, a body of positive law, radiating its own right of enforcement independent of the acts derived from it. This reinforcement came in the form of various cases that served to illustrate the idea of the primacy of the Constitution over other sources of authority in the American Government. In Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), a cause of action based on the First Amendment was upheld against agents of the Department of Agriculture; only those engaged in the adjudicatory process were given immunity, while others not so engaged where held liable

for their acts.

In Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), this Court extended the liability of those guilty of constitutional torts to the members of the legislative branch. While taking note that petitioner did not have Title VII available as a remedy to her, 442 U.S. 247, this Court also was quick to point out "... that the question of who may enforce a statutory right is fundamentally different from the question of who may enforce right that is protected by the Constitution." 442 U.S. 241.

Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L.Ed.2d 15 (1980), saw the extension of liability, based on the Constitution, into areas that were popularly thought to be the exclusive domain of statutory enactment, in that case the Federal

Tort Claims Act (28 U.S.C. §2680(h)). Carlson is noteworthy for another reason. It was there that the test was put forth for whether a particular statute could pre-empt a cause of action based on the Constitution. The Court asks whether there are "special factors counselling hesitation in the absence of affirmative action by Congress," and whether "... Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." 446 U.S. 14,18-19.

The first prong, whether there were 'special factors counselling hesitation', was met in neither Carlson nor Davis. In the former the fact that the officials were involved in running a federal prison was not special enough; and in the latter, that the defendant was a Congressman, who prac-

ticed sex discrimination in employment, was not deemed special enough a situation. To the extent that a Congressman's position created addition concerns, these were addressed by the protections afforded by the Speech and Debate clause. 442 U.S. 228, 246.

There is no decision counsel could find that set out the factors defining the 'special factors' needed to withhold a Bivens remedy. The case of Purtill v. Harris, 658 F.2d 134 (3rd Cir. 1981), upheld pre-emption of Bivens-type actions where the Age Discrimination in Emplyment Act, 29 U.S.C. § 621 et seq., was held to be the exclusive remedy for age discrimination in federal employment. In making that decision the court of appeals held federal employment fundamentally different from private employment and Congressional intent the same

for both the age act and Title VII on which it was closely modeled. 658 F.2d 134,137.

The court in Purtill cited Bush v. Lucas, 647 F.2d 573 (5th Cir. 1981) on remand from 446 U.S. 914, 100 S.Ct. 1846, 64 L.Ed.2d 268 (1980). That case held that the condition of federal employment, in general, was a 'special factor' giving rise to pre-emption of a Bivens remedy. The case was remanded to that court for reconsideration in light of Carlson v. Green, supra, after it refused such a remedy sought by a federal employee who claimed he was demoted for exercise of First Amendment rights. See 598 F.2d 958 (5th Cir. 1979).

In so holding the courts went beyond any holding of this Court. Their rationale was that "... Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs'"

647 F.2d 573,576, citing Sampson v. Murray, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974) at 415 U.S. 83. We, of course, must differ with this holding. Neither Bush nor Purtill give a very convincing explanation for the special status of Government employment. Certainly, it is no more special than being a police officer or fireman, at least as regards the need for discipline and internal governance. See Torre v. Barry, __ U.S. App. D.C. __, 661 F.2d 1371 (1981).[2]

In our case there is little justification for conferring any special status on the petitioner merely because she worked for the CIA. What special protection is needed because of the agency's mission is provided by exemptions in other laws. See

2 That case allowed a D.C. fireman to sue under 42 U.S.C. §1981 and the Fifth Amendment; he was not a federal employee.

e.g., 5 U.S.C. §552 et seq. and 50 U.S.C. §403. While the agency has invoked the spector of 'national security' (App. B-12 to B-13) we assert that it was only a pretext. More importantly, the district judge never found that she ever disclosed or threatened to disclose anything. (App. B-1 to B-19).[3]

The second test enunciated in Carlson is whether or not "congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." 446 U.S. 14,18-19. This test brings us back to Brown v. G.S.A., supra. There at page 825, this Court spoke directly to our concern when it stated, "(C)ongress simply failed explicitly to de-

3 Strangely enough, petitioner, after resigning from CIA, received a high clearance to do similar work for private contractors.

to describe §717's position in the constellation of antidiscrimination law." (Emphasis supplied) While it is clear that 'magic words' need not be recited, it is equally clear that Congressional intent was never spelled out.

Further, the second part of the test calls for assessment of the effectiveness of the remedy when compared to that which the Constitution would provide. In the case of Title VII there is no jury trial, no punitive damages and it is difficult to police the personnel of the agency. All of these concerns were addressed in Carlson, and are present in our case. This last concern has a special congency where the CIA is concerned because it is a closeed agency so shrouded in secrecy that no remedy as conceived under Title VII can adequately insure compliance. Even if com-

pliance could be assured, the remedies are in no sense equivalent.

B. The Court Of Appeals Misconstrued This Court's Decision In Brown v. G.S.A.

Brown v. G.S.A., 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), decided no more than that Congress meant to pre-empt other statutory causes of action for federal employees when it amended the Civil Rights Act of 1964 to include them. That case pitted Title VII against 42 U.S.C. §1981, and the Declaratory Judgment Act, 28 U.S.C. §§2201-2202. No constitutional provisions were pled or invoked. 425 U.S. 823-824. Any conclusion that the decision purports to decide whether VII is exclusive, even in the face of constitutional causes of action, is an extension of the Brown decision beyond the case or controversy

that was before this Court when it decided that case.

While there are intimations that that was what was decided, it would be far better to decide such an issue directly. Beside, when Brown is read carefully on the issue of congressional intent, as to exclusivity, what emerges is the Court's conclusion that Congress was concerned, perhaps incorrectly, only with the lack of remedy against the Federal Government. 425 U.S. 825-829. What we have here, as in all Bivens actions is a suit against the individuals as well as the agency. The two should not be confused.

If a person is sued in his own individual capacity he has the protection of his status as federal employee only to the extent that his actions are inside the 'outter perimeter' of his duties. This is the

only protection given them. See Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed. 2d 1434 (1959), and Butz v. Economou, supra. It is important to maintain the distinction between an agency and the individuals in it. Considerations of sovereign immunity attend the former but not the latter. Any 'immunity' that the individual possesses derives from other sources. The courts of appeal have not honored this distinction well. Petitioner, here, seeks redress against both the individuals and the agency that violated her constitutional rights.

While we may prefer the idea that not even the Government can hide from the Constitution[4], the Eleventh Amendment, with the passage of time, seems to have established the contrary proposition.[5] This

4 See Chisholm v. Georgia, 2 Dall. (2 U.S.) 419, 1 L.Ed 440 (1793).
5 See Anno. Constitution, Jayson, Ed. (1972), p. 1275, citing Cohens v. Virginia, 6 Wheat. (19 U.S.) 264 (1821).

being so because the concept of sovereign immunity insulates the Government to an extent not applicable to persons. Because of this it is even more important to distinguish agency from individual when considering the question of exclusivity of remedy.

The idea contained in Bivens has evolved over the last decade. Carlson seems to say that only a remedy as good as the Constitution, itself, should supplant the Constitution. This concept leaves room, even in the face of Brown v. G.S.A., for allowing suits founded on the Bill of Rights. There are few crannies left in which the question of the existence of Bivens remedies is left unsure. The Court should decide this question so as to clear up this area of doubt.

II. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The question presented has not been directly decided by this Court, but is an important question that should be decided. There are nearly 3 million employees working in the Federal Government. The boundries that delimit their recourse to the Constitution, inside the employee-employer relation should be clearly set out. The current situation create an unusual gap of knowledge over what to plead or rely on when a federal employee opposes the personnel actions of an agency or a superior. Since the elements of a constitutional cause of action are very different from one based on Title VII, and the defenses are also very different, the employee, the

agency, and the individual superiors and agents should know the scope of their protection and their liability.

The importance of the question presented is further shown by the Government's brief in the court of appeals in this case. It was captioned: "The District Court properly dismissed appellant's claims for damages founded upon the Constitution on the ground that Title VII is the exclusive judicial remedy for federal employees alleging job discrimination." There was no attempt by the Government to avoid the question or to imply that it should not be decided.

III. THE PROCEDURAL POSTRUE OF THIS CASE WILL ALLOW THE COURT TO DECIDE THE QUESTION PRESENTED.

Paramount to any decision on whether or not to grant the writ of certiorari must be whether or not the procedural posture of the case is appropriate to decision of the question presented. Because the entire case was not appealed[6] there may be some question, especially in view of the court of appeals' memorandum (App. A). The 4th paragraph says, in its entirety:

> Moreover, the district court's findings, which Ruffin has not assailed and reasonably could not assail as clearly erroneous, support the district court's conclusion that plaintiff had failed to establish any race or sex based adverse employment action or reprisal. Therefore, even if Title VII did not exclude other

6 Petitioner did not appeal the findings of the district court only because she could not afford the transcript of a 4 day trial; she did not qualify for in forma pauperis treatment. In any case, we maintain that the issues on appeal are not dependent on what the district judge decided.

judicial remedies for federal employment discrimination, Ruffin would not be entitled to relief.

First, the entire trial transcript with exhibits was never before the court of appeals. Only the transcript of the status hearing of February 7, 1980, at which the district court explained its reasons for dismissal of the non-Title VII counts, was before the court of appeals. In addition, all the written pleadings were before that court. Second, even if the court was correct in its decision about the Title VII counts, that would not preclude us from having a right to plead alternative causes of action[7] and to have them decided, in this case, by a jury. Third, the elements of a First and Fifth Amendment case differ from that of a Title VII case. Fourth, even if they did not, where two causes of action

7 See Rule 8 - Federal Rules of Civil Procedure.

are pled, having common issues of fact, one requiring a jury and the other not, the one requiring a jury should be submitted to the jury before the other issue is decided by the judge. See Beacon Theaters v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L. Ed.2d 988 (1959), and Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed. 2d 44 (1962), cited in National Life Insurance Co. v. Silverman, 454 F.2d 899 (1971).

Our third point is most important. It is clear that the elements of First and Fifth Amendment causes of action differ from those of a Title VII case. See McDonell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973), and compare with Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), Davis v. Passman, supra, and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct.

2694, 33 L.Ed.2d 570 (1972). The district court never passed on these allegations in their substantive form.

A reading of the district court's own Findings of Fact (App. B, passim) reveals that the temporal sequence of events, alone, will give rise to a prima facie case, at least as to the First Amendment. See Harper v. Blumenthal, 478 F.Supp. 176 (D.C.D.C. 1979). In fact, if the Findings are read in the correct light, they, on their face, make out a prima facie case of reprisal even under Title VII. See Gonzales v. Bolger, 486 F.Supp. 595 (D.C.D.C. 1980) and Hochstadt v. Worcester Foundation For Experimental Biology, 425 F.Supp. 318 (D.Mass. 1976). But we emphasize that even if they did not it would make no difference in the procedural posture for purposes of determining the question presented.

## CONCLUSION

Because the court of appeals has decided petitioner's case in a manner that conflicts with applicable decisions of this Court, and because of the importance of the question presented, petitioner respectfully requests that the Court issue the writ of certiorari and review the case.

Respectfully submitted,

David J. Ontell
Counsel for Petitioner

**APPENDIX**

**A**

**JUDGMENT, CIRCUIT COURT:**

**RUFFIN v. TURNER, DIRECTOR, CENTRAL INTELIGENCE AGENCY, ET AL., No. 80-2337 (D.C. Cir.)**

Not To Be Published - See Local Rule 8(f)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

No. 80-2337 September Term, 1981

Shirley J. Ruffin,

v.

Stansfield Turner, Director, Central Intelligence Agency, et al.

United States Court of Appeals for the District of Columbia Circuit

FILED FEB 24 1982

GEORGE A. FISHER
Clerk

Appeal from the United States District Court for the District of Columbia.

BEFORE: BAZELON, Senior Circuit Judge, WALD and GINSBURG, Circuit Judges.

JUDGMENT

This case was considered on the record on appeal from the United States District Court for the District of Columbia

and was briefed by counsel. The issues presented have been accorded this court's full consideration; they occasion no need for an opinion. See D.C. Cir. R. 11(d), 13(c). For the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED that the judgment from which this appeal has been taken is affirmed.

Per Curiam

For the Court

/s/ George A. Fisher

George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

No. 80-2337 -- Shirley J. Ruffin v. Stansfield Turner, Director, Central Intelligence Agency

MEMORANDUM

Following a four-day trial of appellant Ruffin's Title VII claims, the district court entered findings for appellee Turner. From the facts found, the district court concluded that 1) no race or sex based adverse employment action was taken against Ruffin, 2) Ruffin had not established a prima facie case of reprisal against her for activity protected by Title VII, 3) even if Ruffin had established a prima facie case, Turner presented legitimate, nondiscriminatory reasons for the actions taken with respect to Ruffin.

On appeal, Ruffin does not challenge the district court's determination of her Title VII claims; her contest here is confined to the pre-trial dismissal of her claims, all related to race and sex discrimination in her federal employment, "founded directly on the Constitution." Brown v. General Services Administration, 425 U.S. 820, 835 (1976), held Title VII "the exclusive judicial remedy for claims of discrimination in federal employment" encompassed by that legislation. Brown's rationale, this court has stated, places a federal employee protected by Title VII on a single track; "a federal employee who is covered by [Title VII] may not sue under ... the Fifth Amendment." Torre v. Barry, No. 80-1400, slip op. at 6 (D.C. Cir. Aug. 4, 1981), citing Richardson v. Wiley, 569 F.2d 140, 141 (D.C.

Cir. 1977). But cf. Carlson v. Green, 446 U.S. 14, 30-31 (Burger, C.J., dissenting).

Moreover, the district court's findings, which Ruffin has not assailed and reasonably could not assail as clearly erroneous, support the district court's conclusion that plaintiff had failed to establish any race or sex based adverse employment action or reprisal. Therefore, even if Title VII did not exclude other judicial remedies for federal employment discrimination, Ruffin would not be entitled to relief.

# APPENDIX

# B

# FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY J. RUFFIN, )
)
Plaintiff, )
)
vs. ) Civil Action No.
) 79-1523
STANSFIELD TURNER, )
)
Defendant. )

FILED
SEP 29 1980
JAMES F. DAVEY,
Clerk

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### FINDINGS OF FACT

1. Plaintiff, a black female, began working for the Central Intelligence Agency (CIA) in 1963 as a keypunch operator.

2. In 1968 plaintiff was reassigned to a position as an illustrator in the National Photographic Interpretation Center.

3. Plaintiff applied for and was of-

fered a position as an illustrator in the Graphics Branch, Imagery Analysis Service (later redesignated as the Office of Imagery Analysis (OIA)) where she started working in January, 1975.

4. Plaintiff was a GS-7 upon entering the Graphics Branch and was promoted rapidly, to a GS-8 in July, 1975 and to a GS-9 in September, 1976. The GS-9 level was the highest level plaintiff could obtain in the Graphics Branch unless she became a supervisor.

5. In January, 1975 the Graphics Branch consisted of plaintiff, two black male illustrators, one white male illustrator and a black male branch chief as supervisor, Granville Woodson. Sometime in 1977, Bridget Gray, a black female, joined the Graphics Branch as a part-time employee. [2]

Race and Sex Discrimination Claim

6. In a formal complaint of race and sex discrimination dated April 30, 1978, plaintiff charged that she was the victim of three incidents of discrimination: (1) the contents of plaintiff's fitness report for the period ending November 1, 1977; (2) the conversation between Mr. Woodson and plaintiff regarding plaintiff's Letter of Instruction; and (3) the reaction of the office chief to an April 30, 1978 incident report prepared by the Office of Security on plaintiff's behavior toward a security officer. In addition, plaintiff claimed that males in the Graphics Branch subjected her to various gross and insulting remarks.

7. The fitness report contained Mr. Woodson's and Rebecca Donegan's (Mr. Woodson's supervisor) evaluations of plaintiff's

performance for the period July 1, 1976 through September 30, 1977. Plaintiff is described as a very capable illustrator whose performance has been uneven on occasion because of her unruly behavior. Plaintiff's overall performance rating was proficient, the same rating she received from Mr. Woodson on each of her prior two fitness reports. Ms. Donegan had also concurred in plaintiff's proficient rating for the prior year.

8. There is no evidence whatsoever indicating that the contents of the fitness report are discriminatory or were written to discriminate against plaintiff.

9. A Letter of Instruction (LOI) is an administrative memorandum in which an employee is informed as to what is to be expected of him/her in the year ahead. Mr. Woodson prepared the LOI for plaintiff.

Plaintiff did not agree with some of the contents of her LOI, especially with the reference to the need for cooperation among the Graphics Branch illustrators and between the illustrators and editors and analysts. The comments with regard to such cooperation were contained in the LOI of each illustrator in the Graphics Branch. Plaintiff would not sign her LOI.

10. On two occasions Mr. Woodson attempted to speak with plaintiff about LOI. Plaintiff was loud, argumentative and abusive to Mr. Woodson. During the second occasion, plaintiff raised her voice

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in such hostility to Mr. Woodson that employees some distance away from the Graphics Branch could hear plaintiff's verbal assualt on Mr. Woodson.

11. There is absolutely no evidence

that Mr. Woodson's efforts to communicate with plaintiff about her LOI were in any manner discriminatory. To the contrary, Mr. Woodson was unable to communicate effectively with plaintiff about her LOI because of plaintiff's own conduct.

12. On April 28, 1978, plaintiff met with Noel Firth, Director of OIA, to discuss her LOI. Mr. Firth was discouraged after his conversation with plaintiff. First, it appeared to Mr. Firth that it would be almost impossible for an effective relationship to exist between plaintiff and Mr. Woodson. Second, plaintiff would not accept the slightest criticism or acknowledge that there was any room for improvement in her performance.

13. Plaintiff attempted to gain access to the building in which she worked on April 30, 1978, a weekend. The secur-

ity officer, Gary Baron, would not allow plaintiff into the building since she was not on the Vault Access Roster. Because she was not permitted entry, plaintiff directed a number of abusive remarks to Mr. Baron. Mr. Baron did not raise his voice at plaintiff or direct any abusive comments toward plaintiff.

14. Several days later, Mr. Baron was leaving the security office when plaintiff saw him in the hallway of the building. Mr. Baron said nothing to plaintiff. Yet, in front of many other people, plaintiff raised her voice and began yelling at Mr. Baron, calling him, among other things, a dummy.

15. Mr. Firth was clearly justified in reprimanding plaintiff because of her conduct toward Mr. Baron. There is no evidence that suggests plaintiff was discrim-

inated against on account of the reprimand.

16. No male employee of the CIA made any sexual advances toward plaintiff. There is no evidence that Mr. Woodson or any other.

[4]

male in the CIA imposed or attempted to impose on plaintiff any sexual conduct as a term or condition of employment. There is no evidence to indicate that plaintiff was sexually harassed. It is clear that the atmosphere which frequently prevailed in the Graphics Branch can only be characterized as earthy and vulgar and more redolent of the barnyard than a well-run government office. It is also clear from an abundance of testimony that plaintiff is not a person of undue sensitivity and by her own conduct contributed to the conditions she claims to be objectionable.

17. Beginning in late 1976, plaintiff was having increasing difficulty getting along with other people, both inside and outside the Graphics Branch. Some editors and analysts did not want to work with plaintiff because of the abusive manner in which plaintiff treated them. One of the problems in dealing with plaintiff was that she would not admit to ever making a mistake or error and claimed that somebody else was always at fault. Plaintiff would also make derogatory comments about people, including her supervisors.

18. Plaintiff did not like Mr. Woodson. This attitude was reflected in the hostile manner in which she treated him and she comments she made about him when he was not present. In the months preceding plaintiff's departure from the CIA, Mr. Woodson could not even communicate

with plaintiff because of her attitude toward him.

Reprisal Claims

19. On June 23, 1978 plaintiff filed a complaint of reprisal based on a meeting held on June 19, 1978 between Ms. Donegan, Mr. Woodson and herself.

20. The June 19th meeting was held to discuss plaintiff's performance because plaintiff had requested, through her EEO counselor and in her version of the LOI, that she receive frequent feedback on her work.

21. At the June 19th meeting Ms. Donegan mentioned that plaintiff had made several errors on one project and had taken an inordinate length of time to complete another project. Plaintiff would not acknowledge any flaws in her performance and implied that someone

[5]

else was responsible for the errors and the delay. In addition, Ms. Donegan expressed her concern about the lack of communication between plaintiff and Mr. Woodson. Plaintiff's attitude toward Mr. Woodson was quite evident at this meeting as she would not acknowledge Mr. Woodson's presence at the meeting and referred to him as "that person." At the conclusion of the meeting Ms. Donegan advised plaintiff that her performance had deteriorated to the point that if she did not improve her performance she could not be given a proficient rating on her next fitness report.

22. The meeting of June 19, 1978 was not an adverse employment action and there is no evidence that a causal connection or nexus existed between plaintiff's participation in the EEO process and the meeting.

23. Plaintiff filed a second reprisal claim on August 3, 1978 alleging reprisal because she was requested to take a fitness for duty examination, including a psychiatric examination.

24. In June, 1978 Mr. Firth requested that the Personnel Evaluation Board (PEB) convene to consider plaintiff's conduct and to assist him in resolving the situation which plaintiff's conduct presented. This request was made by Mr. Firth for two reasons. First, plaintiff had been unable to develop effective working relationships with other individuals and defied authority. There was no communication between plaintiff and her supervisor, Mr. Woodson. As a result, morale in the Graphics Branch had been affected. Second, Mr. Firth had recently attended a security reindoctrination briefing where he was struck by the

similarity of plaintiff's behavior with that exhibited by a former CIA employee, Edwin Moore, who later transmitted classified material to the Soviet Union. Mr. Firth thus believed that plaintiff's conduct might have security implications.

25. On July 7, 1978, after hearing Mr. Firth's presentation regarding plaintiff and the problems her behavior presented, the PEB decided that plaintiff should undergo a fitness for duty examination.

26. On July 24, 1978, the PEB met again and decided that because of plaintiff's continued behavior and a desire to await the results of the fitness for duty examination, plaintiff should be placed in a non-duty pay status, which status became effective July

[6]

6, 1978.

27. Plaintiff refused to take the examination.

28. On August 1, 1978 plaintiff and her attorney met with John Rizzo, CIA Assistant General Counsel. Plaintiff was shown the CIA regulations regarding fitness for duty examinations. Mr. Rizzo told plaintiff that the examination was in her and the agency's best interest and that taking the examination did not mean that any administrative action would be taken against her after the completion of the examination. Plaintiff did not want to be examined by CIA physicians and Mr. Rizzo agreed to ascertain whether plaintiff could select her own physicians for the examination.

29. Several days later Mr. Rizzo was able to determine that the CIA would follow Civil Service Commission regulations on this matter which would allow plaintiff to choose

her own physicians as long as they were board certified and acceptable to the CIA. After some delay in reaching plaintiff's attorney, Mr. Rizzo communicated this position to him. Plaintiff submitted to the CIA the names of two physicians but one was not board certified. Before anything else occurred with respect to this situation, plaintiff resigned on September 20, 1978.

30. Other employees of the CIA, black and white, male and female, have been requested to take fitness for duty examinations. Many employees continued their employment at the CIA for years after taking such an examination.

31. Ordering plaintiff to take a fitness for duty examination was not an adverse action and there is no evidence that a causal connection or nexus existed between

plaintiff's participation in the EEO process and plaintiff's being requested to take a fitness for duty examination and plaintiff's resignation from the CIA.

CONCLUSIONS OF LAW

Race and Sex Discrimination Claims

1. Plaintiff brings this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16. [7]

2. The standards which plaintiff must meet to establish an entitlement to relief under Title VII are set forth in Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Plaintiff has not met her initial burden of making out a prima facie case of discrimination. Plaintiff has not shown that she suffered

disparate treatment as a result of any of the actions she has complained of in this suit. Even if we assumed that plaintiff did make a prima facie showing, the CIA has articulated legitimate, nondiscriminatory reasons for any actions taken with respect to plaintiff. See Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

Reprisal Claims

3. Plaintiff's claims of reprisal are also brought under Title VII.

4. The burden of proof allocations set forth in Furnco and McDonnell-Douglas also apply to plaintiff's claims of reprisal. To make out a prima facie case of retaliation plaintiff must show that she participated in a statutorily protected process; that defendant was aware of such participation; that contemporaneous with

or subsequent to the protected activity, an adverse employment action was taken against plaintiff; and that there was a causal connection between the participation in the protected activity and the adverse employment action. Morgan v. Goldschmidt, Civil Action No. 78-1041 (D.D.C. Feb. 27, 1980).

5. No adverse employment action was taken against plaintiff. Plaintiff has not shown that a causal connection existed between her participation in an activity protected by Title VII and any actions taken by defendant. Accordingly, plaintiff has failed to establish a prima facie case of reprisal. Even if we assumed plaintiff did make a prima facie showing, defendant has articulated legitimate, non-

[8]

discriminatory reasons for any actions tak-

en with respect to plaintiff.

6. Judgment is entered in favor of defendant and this action is hereby dismissed.

An order consistent with the foregoing has been entered this day.

/s/ J.H. Pratt
John H. Pratt
United States District Judge

September 26th, 1980.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| SHIRLEY J. RUFFIN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | Civil Action No. 79-1523 |
| | ) | |
| STANSFIELD TURNER, | ) | |
| | ) | FILED |
| Defendant. | ) | SEP 29 1980 |
| | | James F. Davey, Clerk |

ORDER

After a non-jury trial and upon consideration of the findings of fact and conclusions of law submitted, it is this 26th day of September, 1980

ORDERED that judgment be and the same hereby is entered in favor of the defendant and the case be and hereby is dismissed.

/s/ J.H. Pratt
John H. Pratt
United States District Judge

**APPENDIX**

**C**

**EXCERPT OF THE PROCEEDINGS (STATUS CALL) IN RUFFIN v. TURNER, ET AL., FEBRUARY 7, 1980, BEFORE THE HON. JOHN PRATT, UNITED STATES DISTRICT JUDGE. (P. 3, line 20 to P. 6, line 7)**

THE COURT: We are going to have to have another status call.

Mr. Ontell, we have considered Mr. Kogan's partial motion to dismiss and we have concluded that all of the claims, including your constitutional claims with the exception of the Equal Pay Act, in the Title VII context very properly should be [4]
dismissed, and that's following the reasoning of Judge Flannery in Pace v. Matthews. (sic)

Let me elaborate. Count 1 alleges sex discrimination; that's Title VII. Count 2 alleges raise (sic) discrimination; that's Title VII. Count 3 alleges retaliation; that's Title VII. Count 4 alleges procedural violations of Title VII. Count 9, of course, provides a separate basis for jurisdiction. It relates to the Equal Pay

Act. And getting down ot the ones we haven't mentioned, Count 5 is entitled "Denial of Freedom of Association." That, clearly, is an issue of reprisal squarely covered by Title VII. The same can be said of Count 6, which is entitled "Denial of Freedom of Speech and Right to Petition," and in another context that would be a separate constitutional tort; but it is in this context a reprisal claim covered by Title VII; similarly with respect to Count 7, which is styled "Dischargeed." (sic)

So that for all of those non-Title VII claims, except for the Equal Pay claim and Title IX (sic), we are going to dismiss those and have prepared an order to that effect. All claims against the Defendant Turner in his individual capacity are dismissed. Admiral Turner as the head of the CIA can only be liable in his of-

ficial capacity, and therefore, the claims against him in his individual capacity are dismissed. Similarly, under the Brown case, the defendants, Firth, Lott, Donegan, since they are being sued in their individual capacity for

[5]

the various things that have been alleged against the Defendant Turner, claims against them in their individual capacity are also dismissed.

Now the claims against these same defendants, Firth, Lott, Donegan, in their official capacities, except the Equal Pay Act claim in Title IX (sic), are also dismissed. All claims for compensatory and punitive damages are dismissed.